No. 99-754

IN THE

Supreme Court of the United States

ALLISON L. FORMAN,

Petitioner,

v.

REGAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

CONNELL A. LOFTUS
Counsel of Record
MANN BRACKEN LAYNG
& KNEZO, LLC
Attorneys for Respondent
110 East Market Street
Suite 201
Leesburg, Virginia 20176
(703) 771-8600

156495

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

The parent company of the Respondent is American Financial Group. No publicly held company owns 10% or more of the stock of the Respondent.

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Regal Insurance Company [hereinafter, referred to as "Respondent" and "Regal"], by counsel, respectfully files this Brief in Opposition to the Petition for Writ of Certiorari [hereinafter, referred to as "Petition"] filed by Allison L. Forman [hereinafter referred to as "Petitioner" and "Forman"].

ORDERS ISSUED BELOW

On March 1, 1999, after the conclusion of a jury trial, the Circuit Court for the City of Alexandria, Virginia entered judgment on behalf of Regal in the amount of $25,000.00 together with interest from April 7, 1997, and its costs expended. *Regal Insurance Company v. Forman*, At Law #CL-960409 (C. Ct. Va. March 1, 1999). On June 21, 1999, Forman's Petition for Appeal to the Supreme Court of Virginia was dismissed for failure of Forman to perfect said appeal in a manner provided by law. *Forman v. Regal Insurance Company*, Record No. 991158 (Va. June 21, 1999). Forman's Petition for Rehearing to the Supreme Court of Virginia was denied on July 30, 1999. *Forman v. Regal Insurance Company*, Record No. 991158 (Va. July 30, 1999).

RESPONDENT'S OBJECTIONS TO FORMAN'S PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 15 OF THE RULES OF THE UNITED STATES SUPREME COURT.

A. Plaintiff's Objection to Forman's Assertion of this Court's Jurisdiction Pursuant to 28 U.S.C. § 1257.

Forman summarily asserts that the United States Supreme Court has jurisdiction in this case based upon 28 U.S.C. § 1257. Forman's assertion is without merit.

28 U.S.C. § 1257(a) provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." However, in this case, Forman's appeal was not considered by the Virginia Supreme Court because of her failure to properly perfect her appeal in a manner provided by law. Therefore, no "final judgment or decree" was rendered by the highest court of the Commonwealth of Virginia and the United States Supreme Court does not have jurisdiction to review this case under 28 U.S.C. § 1257.

First, Forman's Petition is defective on its face because it fails to allege jurisdiction in this Court. While Forman summarily invokes 28 U.S.C. § 1257, she neglects to address the essential elements of that statute. Nowhere in her Petition does Forman state that a final judgment was rendered by the Virginia Supreme Court. Instead, Forman's Petition focuses upon the verdict rendered by the jury in the Circuit Court for the City of Alexandria, Virginia. Because the Petition, on its face, does not set forth the basic requirements for jurisdiction to lie in this Court, Forman's appeal to this Court must be denied.

Further, even if Forman's failure to specifically set forth a basis for jurisdiction is not fatal, the record of this case dictates that jurisdiction cannot lie in this Court under the requirements of 28 U.S.C. § 1257. As stated above, no final judgment or decree was rendered by the highest court of Virginia. In fact, the Supreme Court of Virginia could not review Forman's appeal to that court because it was not properly filed as required by law. This denial of Forman's Petition for Appeal to the Supreme Court of Virginia did not rise to the level of a final judgment or decree as required by 28 U.S.C. § 1257.

Although 28 U.S.C. § 1257 was amended in 1988, the language requiring a "final judgment or decree" has been consistently interpreted by this Court. Accordingly, this Court's jurisdiction to review state court decisions is limited to final judgments rendered by the highest court of a state in which a decision may be had. *See Flynt v. Ohio*, 101 S. Ct. 1958, 451 U.S. 619, 68 L. Ed. 2d 489 (1981). Moreover, if a specific issue is not necessarily decided by the highest state court by its affirmation of a lower court ruling, then the United States Supreme Court has no power to consider that specific issue. *See Street v. New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 2d 572, *on remand*, 250 N.E.2d 250, 24 N.Y.2d 1026, 302 N.Y.S.2d 848 (1969).

In this case, it is clear that the Virginia Supreme Court never had the opportunity to review the merits of Forman's appeal or to render a final judgment thereon. Since Forman failed to perfect her appeal in the manner provided by law, the rules of the Supreme Court of Virginia dictated that the appeal could not be considered and that the appeal had to be denied by default.

This Court has held that a default judgment does not rise to the level of a "final judgment or decree." In *Hammerstein v. Superior Court of California*, 71 S. Ct. 820, 341 U.S. 491, 95 L. Ed. 1135, *rehearing denied*, 72 S. Ct. 21, 342 U.S. 843, 96 L. Ed. 637 (1951), the California Supreme Court refused to grant a writ of certiorari from a default judgment entered by the Superior Court of California because the petitioner had failed to utilize the proper channels of review by appealing from the judgment rendered by the lower court. This Court determined that it did not have jurisdiction to review the proceedings arising from the default judgment since a final judgment had not been rendered by the highest court of California. *Id.* at 71 S. Ct. 820.

In conclusion, a jury verdict was rendered in this case in the Circuit Court for the City of Alexandria, Virginia and the appeal thereto was denied because of Forman's failure to properly perfect the appeal. That failure resulted in a denial of Forman's appeal by default and, therefore, no "final judgment or decree" was rendered by the Virginia Supreme Court. Forman's Petition fails, on its face, to properly allege jurisdiction in this Court, and the facts demonstrate that the essential elements of 28 U.S.C. § 1257 have not been satisfied. Thus, this Court lacks jurisdiction to consider Forman's Petition.

B. Respondent's Objections to Petitioner's Misstatements of Law and Fact.

1. Regal objects to the misstatement of law and fact contained in Forman's Petition. "The jury verdict found Appellant negligent of causation of the accident and awarded $0.00 damages as they did not find that the injuries / medical expenses were caused by the accident." Petition p. 3. Since the issue of Regal's damage claim was decided by the Court as a matter of law in the trial of the matter, it was not the province of the jury to determine the nature and extent of the damages. Thus, any superfluous information included by the jurors with respect to damages was and is irrelevant to this proceeding.

2. Regal objects to the misstatement of law and fact contained in Forman's Petition stating

> When the jury learned that judgment had been entered in the sum of $25,000.00, they immediately expressed their findings to the Court in writing and explained how they had set forth

> their verdict in light of the instructions to the jury, the responses to their questions and their frustrations based on communications with the Court.

Id. at p. 4. This statement is inaccurate, irrelevant and, most importantly, not a part of the record of this case. Thus, Regal objects to the statement's inclusion in Petitioner's brief and requests that the Court does not consider same.

3. Regal objects to the misstatement of law and fact contained in Forman's Petition that "Appellant filed Notice of Appeal on March 26, 1999 and Petition for Appeal on June 1, 1999." *Id.* at p. 4. In reality, Forman failed to file her Petition for Appeal by June 1, 1999, as was provided for by Rules 5:17(a)(1).[1] and 5:5(b)[2] of the Rules of the Supreme Court of

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1. Rule 5:17 Petition for Appeal.

> (a) *Time for Filing.* — In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:
>
> (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from; . . .

2. Rule 5:5. Extension of Time; Filing by Mail.

> (b) Any document required to be filed with clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Virginia Worker's Compensation Commission or clerk of the State Corporation Commission.

Virginia The aforesaid rules provide for filing at the clerk's office of Virginia Supreme Court in Richmond, Virginia, or, alternatively, by mailing same by registered or certified mail the day in which the Petition for Appeal is due. Forman was unable or unwilling to utilize either method. Thus, Regal objects to the statement as quoted above.

4. Regal objects to the misstatement of law and fact contained in Forman's Petition that "The Appellant in this matter was in full compliance with Rule 5:17(a)(1) and Rule 5:5(b)." In fact, Forman failed to comply with both Rule 5:17(a)(1) and Rule 5:5(b).

ARGUMENT

A. The Due Process Clause of the United States Constitution.

Forman claims that the denial of her appeal by the Virginia Supreme Court violates the Due Process clause of the United States Constitution, as is applied to the states by the Fourteenth Amendment. However, she has failed to identify either a substantive right that has been denied or a procedural inadequacy that triggers the Due Process clause. Thus, Forman's Petition must be dismissed.

1. Substantive Due Process.

In her Petition, Forman implicitly contends that she has a substantive right to have her appeal heard on the merits. However, this Court has consistently held that litigants have no substantive right to an appeal.

The right of appeal is not essential to due process. *Reetz v. Michigan*, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903). An appellate review is not essential to due process of law, but is a matter of grace. *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L.E. 394 (1926). The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930). Due process does not comprehend the right of appeal. *District of Columbia v. Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937). If a full and fair trial on the merits is provided, the due process clause of the Fourteenth Amendment does not require a state to provide appellate review. *Lindsey v. Normet*, 405 U.S. 31, 92 S. Ct. 862, 21 L. Ed. 2d 36 (1972). There is no constitutional right to an appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

In the case at hand, Forman was provided with a trial on the merits. At that trial, Forman was afforded the opportunity to cross examine the witnesses called against her and to call her own witnesses. She took advantage of both those opportunities and still lost her case. In fact, Forman does not contend in her Petition that she was denied due process by the trial court.

Therefore, since it is uncontested that due process was provided to Forman in the trial court and since there is no right to an appeal, Forman was provided all of the process that was due under the Constitution. Thus, the Virginia Supreme Court's dismissal of Forman's Petition for Appeal was appropriate and must be upheld.

2. Procedural due process.

Forman implicitly argues in her Petition that the Virginia Supreme Court's denial of her Petition for Appeal based on her failur to properly perfect her appeal as required by law amounts to a violation of her procedural due process rights. This contention is also without merit.

Under normal circumstances, the determination of whether there is a procedural due process violation is governed by a balancing of the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of said interest; (3) the probable value of additional or substitute procedural safeguards; and (4) the government's interest, including the fiscal and administrative burdens that additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

In this case, however, there is no substantive due process violation because Petitioner has no right to appeal. If the Petitioner has no substantive right, then the absence of any protective procedures cannot be a violation of procedural due process. *See Caballero v. Caplinger*, 914 F. Supp. 1374, 1378 (E.D. La. 1996) ("if there is no right, the absence of any protective procedures is immaterial"). Petitioner can only be entitled to a meaningful procedure, the process that is due, if she first shows the deprivation of a protected constitutional interest. As demonstrated, Petitioner has no statutory or constitutional right to an appeal. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 1249 n.2, 140 L. Ed. 2d 387 (1998) (holding that asserting a mere protected interest in a process itself is not a cognizable claim); *Olim v. Wakinekona*, 461 U.S. 238, 249-50, 75

L. Ed. 2d 813, 103 S. Ct. 1741 (1981) (finding that an individual cannot claim a constitutional right in the "process" until he or she can demonstrate a cognizable liberty interest). Therefore, Forman cannot even claim a violation of her procedural due process rights.

Notwithstanding that conclusion, if the Court did balance the *Mathews* factors, Forman's claim of a procedural due process violation would still fail. Balancing the risk of an erroneous deprivation against the government's interest, the government's interest outweighs that of Petitioner. Forman's right to an appeal is not absolute, especially in light of the fact that her Petition for Appeal could have been mailed to the court on any earlier date to ensure timely receipt, or that the she could have hand-delivered the Petition for Appeal to the Virginia Supreme Court clerk's office on or before the June 1, 1999 deadline. Instead, Forman chose to disregard or ignore the letter of the law and to file her Petition in a manner contrary to the Rules of the Supreme Court of Virginia. She cannot now claim that her due process rights were violated by her own actions in selecting an improper method for delivering her Petition for Appeal to the Supreme Court of Virginia.

Based upon the above, it is clear that Forman has failed to raise any facts or law in support of her contention that her procedural due process rights have been violated. She has not asserted a Constitutionally protected right, nor has she indicated how her own mistake constitutes a violation of her due process rights. Accordingly, Forman's Petition must be dismissed.

B. Rule 10 of the Rules of the Supreme Court of the United States.

As this Court is aware, review on a writ of certiorari is not a matter of right, but of judicial discretion and only will be granted for compelling reasons. Under Rule 10(c) of the United States Supreme Court, if "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.", this Court may hear the case. However, in the case at hand, Forman's Petition has not identified the "an important question of federal law that has not been, but should be, settled by this Court", nor has Forman's Petition identified any decision that has been rendered by the Virginia Supreme Court which "conflict(s) with the relevant decisions of this Court".

While the language of Rule 10 is neither controlling nor a full measure of this Court's discretion, the reasons for review enumerated therein do indicate the "character of the reasons" this Court considers when it hears cases. Since Forman fails to address those considerations in her Petition, Regal asks that Forman's Petition for Writ Certiorari be denied.

CONCLUSION

Allison L. Forman's Petition for Writ of Certiorari must be denied. It fails on its face to properly allege the jurisdiction of this Court and fails to demonstrate that a "final judgment or decree", necessary for this Court's jurisdiction, was rendered by the Virginia Supreme Court. Moreover, the Petition fails on its face to allege or to demonstrate that a substantive or procedural due process right was violated by the Courts of Virginia. Lastly, the Petition fails to even address those factors enumerated by Rule 10 of the Rules of the United States Supreme Court, which serve as a guide to this Court's consideration of Petitions for Writ of Certiorari.

For the foregoing reasons, Regal Insurance Company requests that Allison L. Forman's Petition for Writ of Certiorari be denied.

Respectfully submitted,

CONNELL A. LOFTUS
Counsel of Record
MANN BRACKEN LAYNG
& KNEZO, LLC
Attorneys for Respondent
110 East Market Street
Suite 201
Leesburg, Virginia 20176
(703) 771-8600